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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

JUDITH KIRBY, Plaintiff and Appellant, v. WILLIAM A. CLOUGH et al., Defendants and Respondents.	C036678 (Super. Ct. No. PV004863)

In this malicious prosecution case, plaintiff Judith Kirby appeals from summary judgment entered in favor of defendants William A. Clough and David Blackman, attorneys who, on behalf of a client, pursued underlying litigation against Kirby. Kirby contends the trial court improperly failed to consider all of her opposition papers, and improperly concluded a preliminary ruling in favor of the plaintiff in the underlying action constituted probable cause for bringing the underlying action. We shall affirm the judgment. We shall deny Blackman's motion for sanctions for a frivolous appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This court reviews de novo the trial court's decision to grant summary judgment. This court reviews the ruling, not the rationale. In reviewing the summary judgment, this court applies the same three-step analysis used by the trial court: we (1) identify the issues framed by the pleadings; (2) determine whether the moving party has negated the opponent's claims; and (3) determine whether the opposition has demonstrated the existence of a triable material factual issue. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

On April 8, 1999, Kirby filed this malicious prosecution suit against Clough and Blackman (and another person who is not party to the appeal) in El Dorado County. The malicious prosecution complaint alleged as follows:

On October 7, 1993, Clough, an attorney acting as counsel of record for Kathileen [*sic*] Mello, instituted a civil action against Kirby in Yolo County, naming as plaintiffs Mello individually and as a partner in Alteza Solari Arabians, and Alteza Solari Arabians, a California general partnership. This underlying action claimed the right of the partnership to possession of certain Arabian horses, and damages resulting from Kirby's wrongful retention of the horses. No such partnership existed, and Clough knew it did not exist. Clough later substituted out of the case, and Blackman became counsel of record for Mello. Blackman knew no such partnership as Alteza Solari Arabians existed and Mello had no right to claim any interest in the horses. Blackman later withdrew from the case

and was replaced by another attorney (who is not party to this appeal). There followed a 10-day court trial, in which Clough testified and acknowledged he never represented Alteza Solari Arabians and could not explain why he named it as plaintiff in the underlying complaint. In July 1998, the trial court rendered judgment in favor of Kirby.

In December 1999, Clough and Blackman filed separate motions for summary judgment in the malicious prosecution case. They filed separate but similar "Separate Statement[s] of Undisputed Facts," listing 16 numbered paragraphs, asserting among other things:

a. In the underlying action, Kirby filed a cross-complaint against Mello, alleging breach of contract, fraud, etc.

b. In the underlying action, Clough filed on Mello's behalf, an Application for a Writ of Possession, supported by declarations and exhibits. Kirby filed an opposition with declarations and exhibits.[1] After a hearing, the trial court on November 24, 1993, granted the application, ruling in part that Mello (et al.) were "entitled to the [w]rit of [p]ossession only if the court is satisfied that they enjoy a reasonable probability of success when the matter goes to trial. [¶] The court is satisfied the Plaintiffs [Mello et al.] have shown the required likelihood of success."

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[1] Kirby was apparently acting in propria persona at the time; she has since been represented by counsel at times and acted in propria persona at other times.

c. At Kirby's deposition in December 1994, she testified among other things that she entered Mello's property without permission on several occasions under cover of night. Kirby took two horses, Mi Linda and Domingo Del Gato, from Mello's property without Mello's permission. Kirby cut chains and fencing to take the horses.

d. The exhibits in the underlying action included a declaration by one Deborah Huaco, acknowledging the existence of the Alteza Solari Arabians partnership, and a letter by Ernesto and Deborah Huaco, stating they left the partnership primarily due to "incessant harassment by Judith Kirby," and that Kirby mailed them slanderous information and made threatening calls in a constant attempt to defame Mello's character and "stress us into getting out of the partnership for peace of mind."

e. At trial in the underlying action, Kirby brought a motion for judgment, which the trial court denied.

f. In January 1998, following a bench trial (by the same judge who issued the writ of possession), the court issued a statement of decision that neither Mello nor Kirby would take anything by their respective complaints. In July 1998, the trial court denied Kirby's motion for determination of prevailing party and entered judgment in the underlying case, ordering that Mello take nothing by her complaint, that Kirby owned and was entitled to possession of the horses——free of any claim by Mello, that no monies were due to Kirby, and Kirby would take nothing by her cross-complaint, and the parties were to bear their own costs.

The record contains a copy of the trial court's Statement of Decision in the underlying case, stating:

"1. Defendant Kirby ('Kirby') owned an Arabian stallion named 'Domingo,' a mare named 'Mi Linda,' and another horse named 'Wandering Starr.' In late 1992, Kirby entered into written arrangements with cross-defendants Ernesto and Deborah Huaco ('Huacos') whereby the Huacos took possession of Mi Linda and Wandering Starr. The contracts, dated August 1992 and September 1992, stated on their faces that they were sale agreements, with a deferred payment of $3,500 per horse. The parties struck out the monthly payment provisions in the contracts.

"2. The meaning of these two 'contracts' is unclear. Both the Huacos and Kirby testified that they understood these contracts to be leases, not sale agreements. Neither the Huacos nor Kirby, the only parties to the contracts, intended that the Huacos become owners of Mi Linda and/or Wandering Starr. The contracts forbade resale of the horse by the Huacos. The 'contracts' thus appear to have reflected some form of bailment, yet the evidence is insufficient for the court to construe or enforce these ambiguous documents.

"3. At some point the Huacos placed Mi Linda and Wandering Starr with Mello for breeding and boarding. Mello argues that she was a partner with the Huacos in an enterprise called 'Alteza Solari Arabians.' The evidence is insufficient to establish a partnership between the Huacos and Mello. Mello also argues that she is the owner of Mi Linda as successor or

assignee or partner to the Huacos. The evidence is insufficient to support Mello's argument.

"4. Meanwhile, Kirby allowed Mello to care and board Kirby's stallion, Domingo. Kirby and Mello had a falling out, and in the spring of 1993, Kirby demanded that Mello return Domingo. Mello refused, asserting that Kirby had given Domingo to her. The evidence is insufficient to establish Mello's gift theory as to Domingo.

"5. Unable to obtain the return of her stallion, Kirby resorted to self-help. Under cover of darkness, Kirby . . . entered Mello's property and retook . . . Mi Linda, in or about May 1993. Kirby also retook possession of Domingo from Mello's barn in September 1993. Kirby's method of repossessing the horses was a trespass, but there was no evidence that Mello incurred damage as a result of Kirby's trespass.

"6. These events culminated in the filing of this action in October 1993 by Mello against Kirby for sixteen separate causes of action in contract and tort, the gist of which is Mello's assertion that she believed she had purchased Mi Linda from the Huacos, and that Kirby had given Domingo to Mello. The evidence is insufficient to support a determination favorable to Mello on the ownership of Domingo and Mi Linda. These two horses were and are Kirby's property; possession lies properly with Kirby.

"7. The Court's role is to weigh evidence and render determinations. Despite the eloquence and thorough argument of all counsel, the evidence was insufficient to establish the

theories of the complaint and cross-complaint by a preponderance of the evidence. The Court thus finds that there was no partnership between Mello and the Huacos, that Kirby is the owner of Mi Linda and Domingo and entitled to possession, and that the repossession of Mi Linda and Domingo by Kirby . . . was improper but that Mello did not suffer any damages as a result.

"8. The court further finds that the 'contracts' between the Huacos and Kirby are so ambiguous as to render their construction impossible, therefore the court has no basis on which to award attorney's fees. . . ."

On December 30, 1999, in this malicious prosecution case, Kirby filed an opposition to Blackman's summary judgment motion, asserting the motion must be denied as untimely because service on her was late. On the same date, Kirby filed an opposition to Clough's summary judgment motion, asserting it should be denied for failure to include a separate statements of undisputed facts.

On January 4, 2000, Clough filed a reply, stating he did file and serve on Kirby a separate statement of undisputed facts, though his proof of service failed to list it. Clough said he sent a second copy to Kirby and asked that the court continue the hearing rather than deny the motion if the court accepted Kirby's contention that she was not previously served. On January 7, 2000, Blackman filed a reply, discussing service and noting Kirby made no substantive opposition to the merits of the motion.

On January 14, 2000, the trial court by minute order continued the hearing to February 18 and ordered Kirby "TO FILE AND SERVE A MEMORANDUM OF POINTS AND AUTHORITIES AND A SEPARATE STATEMENT IN OPPOSITION IN CONFORMITY WITH CALIFORNIA RULES OF COURT, RULE 342[2] WITH RESPECT TO EACH MOTION . . . ."

On January 28, 2000, Kirby filed a memorandum of points and authorities opposing summary judgment, but she did not file a separate statement responding to the moving parties' statements of undisputed facts, in conformity with Rule 342, which requires the party opposing summary judgment to respond point by point to each point asserted in the moving party's separate statement of undisputed facts. Instead, Kirby filed her own "STATEMENT OF UNDISPUTED FACTS AND SUPPORTING EVIDENCE," asserting the following four facts were undisputed:

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2 Rule 342(f) of the California Rules of Court provides "Each material fact claimed by the moving party to be undisputed shall be set out verbatim on the left side of the page, below which shall be set out the evidence said by the moving party to establish that fact, complete with the moving party's references to exhibits. On the right side of the page, directly opposite the recitation of the moving party's statement of material facts and supporting evidence, the response shall unequivocally state whether that fact is 'disputed' or 'undisputed.' An opposing party who contends that a fact is disputed shall state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence shall be supported by citation to exhibit, title, and page, and line numbers in the evidence submitted." (Further references to rules are to the California Rules of Court.)

The format is set out in subdivision (h) of Rule 342.

1. No fictitious business name statement was ever filed for Alteza Solari Arabians partnership.

2. No full, evidentiary hearing was held on Mello's application for a writ of possession.[3]

3. Kirby told Clough and Blackman there was no partnership in existence, and she did not have any contract with any partnership.

4. Clough testified his retainer agreement with Mello was as an individual, not as a partner, since he did not know if a partnership even existed.

Blackman and Clough responded, among other things, that Kirby failed to show any evidence that no full, evidentiary hearing was held, and that the status of the partnership was a nonissue because Kirby had waived the fictitious business name matter by failing to assert it as a defense in the underlying action, and Kirby's and Clough's beliefs regarding partnership were irrelevant to its existence. Blackman and Clough also made

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[3] As supporting evidence for this assertion, Kirby referred to her own declaration, which stated: "At the hearing on Ms. Mello's request for a writ of possession, I had no attorney, and Mr. Clough represented Ms. Mello. She lied throughout, and unfortunately the court believed her. After trial, the very same judge ruled against [Mello], having found that she lied. In particular, Ms. Mello's claim on Domingo Del Gato was that I 'gave' him to her because she told me that he was very sick and would incur substantial vet bills; at trial she testified that she had told me that, then found out he was not sick, and there were not going to be large bills, and she never told me that (which was a question *Judge Warriner* asked her). The only basis for her claim on Domingo was thus shown to be a lie when she testified at trial."

evidentiary objections, but did not secure rulings from the trial court.

On March 6, 2000, the trial court issued its written order granting summary judgment in favor of Clough and Blackman. The order reiterated its prior minute order, directing Kirby to file and serve a response to the moving parties' separate statements of undisputed facts. The court noted Kirby had *not* complied with the court's minute order or the provisions of Code of Civil Procedure section 437c and rule 342, but instead had filed a single separate statement of four "facts" she claimed were undisputed. The court said the separate statements of Clough and Blackman "must be considered as true as they are uncontroverted by [Kirby] despite the fact that she was given a continuance to allow her to do so. [Fn. omitted.] In brief, those facts state among other things that (1) the Yolo County court granted Mello's application for a writ of possession, finding that Mello had a likelihood of prevailing on the merits of the action and that Kirby's removal of the horses from Mello's possession was improper . . . ; (2) that Kirby sneaked onto Mello's property at night on May 17, 1993 to remove horses without Mello's permission . . . ; and (3) she or 'her party' cut the chain and broke the door to the stall to obtain the horse(s) on the night of September 14, 1993 . . . ." The court further stated "The evidence proffered by [Blackman and Clough] amply establishes probable cause for institution of a lawsuit as that term is used in connection with malicious prosecution actions. The fact that at the hearing on the writ of possession

in the Yolo County action the judge's finding that Mello would probably succeed on the merits is of itself sufficient to establish probable cause. Plaintiff has failed to come forward with any evidence establishing a lack of probable cause and has failed to comply with this Court's prior order." The court denied Kirby's motion for reconsideration.

Kirby appeals from the judgment entered in favor of Clough and Blackman.

DISCUSSION

I. Standard of Review

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established . . . ." (Code Civ. Proc., § 437c, subd. (o)(2); see also, *Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 486-487.) Once the moving party defendant meets its burden, the burden shifts to the plaintiff to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (o)(2).) On appeal, the reviewing court exercises its independent judgment, deciding whether under the undisputed facts, the opposing party's claim cannot be established or there is a complete defense. (*Romano, supra*, 14 Cal.4th at pp. 486-487; *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.)

II. Malicious Prosecution

"'To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].'" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676, quoting *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.)

III. Defects in Opposition Papers

Kirby contends the trial court committed reversible error by "failure to consider" all of her opposition. We disagree.

Kirby is wrong in suggesting that the trial court found fault with her opposition where no fault existed. She suggests without support that the trial court considered only her separate statement, and not her declaration or memorandum of points and authorities.[4] However, what the trial court did was point out, quite correctly, that Kirby had failed to submit a document she was required by statute and by court rule to submit, i.e., a separate statement responding to each

[4] Clough and Blackman made evidentiary objections to Kirby's declaration but did not secure rulings from the trial court. We shall conclude that, even treating the objections as waived (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1), no grounds exist to reverse the judgment.

"undisputed fact" set forth in the moving parties' "Separate Statement[s] of Undisputed Facts."

Section 437c, subdivision (b), requires: ". . . The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. . . . Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion. . . ."

Rule 342 reiterates the same requirement.

Here, the trial court did not grant summary judgment on this procedural ground alone, but viewed as undisputed the factual assertions in the moving parties' separate statements of undisputed fact, and noted plaintiff failed to come forward with any evidence establishing a lack of probable cause.

Kirby's opening brief on appeal is deficient because she fails to acknowledge her own failings and fails to develop any legal or factual analysis to show any abuse of discretion by the trial court with respect to Kirby's failure to file a response to the moving parties' separate statement of undisputed facts. She has therefore waived the matter, and her attempt to develop such analysis in her reply brief comes too late. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *In re Marriage of*

Nichols (1994) 27 Cal.App.4th 661, 672-673, fn. 3; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

Instead, Kirby complains the trial court failed to address her theory that she could recover for malicious prosecution on the ground that no such partnership as Alteza Solari Arabians existed or ever filed a fictitious business name statement under Business and Professions Code section 17918 (hereafter § 17918).[5] However, insofar as Kirby complains of the denial of her motion for reconsideration, she has waived the matter by failing to brief it adequately under California Rules of Court, rule 15, and failing to develop any legal or factual analysis on the matter of reconsideration. (*In re Marriage of Nichols, supra,* 27 Cal.App.4th at pp. 672-673, fn. 3.)

Moreover, Kirby fails to show the validity of her theory in that she fails to address the argument and authorities cited by Clough and Blackman in the trial court and on appeal, that section 17918 does not foreclose the initiation of an action on behalf of a partnership which has not filed a fictitious business name statement, and unless raised as a plea in abatement, does not affect the validity of the action. (E.g.,

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[5] Business and Professions Code section 17918 provides: "No person transacting business under a fictitious business name contrary to the provisions of this chapter, or his assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed [with the county clerk], and published as required by this chapter. . . ."

American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal.App.4th 551, 562; *Folden v. Lobrovich* (1957) 153 Cal.App.2d 32, 34 [Failure to comply with fictitious business name statute (predecessor statute to section 17918) "is a technical defense which must be raised by the defendant or it is waived and will not be considered by the trial court"].)

With respect to the matter of whether a partnership existed between Mello and the Huacos, Kirby fails to show grounds for reversal of the judgment. In determining whether a partnership relationship has been created, courts look to the words and acts of the parties involved in the relationship. (*Sandberg v. Jacobson* (1967) 253 Cal.App.2d 663.) The question for purposes of this appeal is whether there is a dispute as to what facts were known by Clough and Blackman. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [when facts known by the attorney are not in dispute, the probable cause issue is properly determined by the court under an objective standard; it does not include a determination whether the attorney subjectively believed the prior claim was legally tenable].)

Here, the record contains a declaration of Deborah and Ernesto Huaco, attesting they and Mello were partners in Alteza Solari Arabians. The declaration was dated November 1993, after the October 1993 filing of the underlying complaint. Also, an October 1993 affidavit from the Arabian Horse Registry of America, Inc. reflected that Alteza Solari Arabians was registered with the Registry, at Mello's address. Kirby fails to acknowledge this evidence in her opening brief on appeal.

Her attempt to discuss this evidence in her reply brief comes too late, since we need not address new points raised for the first time in the reply brief. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

Kirby cites her own declaration that she told Clough and Blackman no such partnership existed between Mello and the Huacos. However, Kirby's opinion is irrelevant. Kirby also asserts Clough's testimony showed he did not know why he had prosecuted the action for the partnership. However, the testimony of Clough merely indicated the legal services agreement named as the client only Mello individually, not in any partnership capacity, and it was Clough's understanding the Huacos had given Mello any rights they may have had under the partnership, though he could not remember when he spoke with the Huacos, and it was a question in his mind as to whether the partnership continued.

Kirby fails to raise a triable issue. She also fails to show applicability of her cited authority, *Arcaro v. Silva & Silva Enterprises* Corp. (1999) 77 Cal.App.4th 152, which affirmed a court verdict finding an underlying action lacked probable cause, where Silva was on notice that Mr. Arcaro's signature had been forged on the debt documents upon which Silva filed the underlying collection action against Mr. Arcaro. Notice of the forgery did not arise merely upon Mr. Arcaro's say-so, but upon his providing sample signatures which no reasonable person could conclude resembled the signature on the credit application, and upon his providing the name of a

suspect, a person already known to be involved, and an explanation how that person could have acquired Mr. Arcaro's personal information. (*Id*. at p. 156.) Moreover, Silva failed to identify any evidence which would have warranted an inference that the signature was genuine. (*Id*. at p. 158.) Here, Kirby claims she presented evidence to Clough and Blackman that no partnership existed, but she fails to identify any such evidence. As indicated, her opinion that no partnership existed did not constitute evidence that no partnership existed.

Kirby argues the attorneys were required to obtain objective evidence of an ongoing partnership, such as tax forms or bank accounts, in order to establish entitlement to summary judgment. She cites no authority for this proposition. In her reply brief, Kirby also points out Clough testified the underlying complaint he filed may have contained an inaccurate statement, in that the document by which the Huacos obtained the horse did not mention the partnership, whereas the pleading alleged the Huacos signed the document on behalf of themselves and the partnership. Kirby contends this evidence precludes any claim that Clough had probable cause to file the prior action. We disagree.

Kirby fails to show any grounds to reverse the judgment based on the trial court's treatment of her opposition papers.

IV. Probable Cause

Kirby contends the trial court erred in concluding the preliminary ruling granting a writ of possession in favor of

Mello in the underlying action constituted probable cause to bring the underlying action. We disagree.

The motions for summary judgment were predicated on the theory that the trial court's grant of the writ of possession in the underlying case established probable cause.

A plaintiff has probable cause to bring a civil suit if his claim is legally tenable; this question is addressed objectively, without regard to the mental state of plaintiff or his attorney. (*Sheldon Appel Co. v. Albert & Oliker, supra,* 47 Cal.3d at p. 881.) The court determines as a question of law whether there was probable cause to bring the maliciously prosecuted suit. (*Id*. at p. 874.) Probable cause is present unless any reasonable attorney would agree that the action is totally and completely without merit. (*Id*. at p. 885.) This permissive standard for bringing suits, and corresponding high threshold for malicious prosecution claims, assures that litigants with potentially valid claims won't be deterred by threat of liability for malicious prosecution. (*Id*. at p. 872.)

"Probable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in a malicious prosecution action must separately show lack of probable cause. Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which all reasonable lawyers agree totally lack merit——that is, those which lack probable cause——are the least

meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause. [Citation.]" (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382, italics omitted.)

Where there are no disputed questions of fact relevant to the probable cause issue, the matter may be determined by summary judgment. (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 63.)

Here, the trial court in the underlying case determined the case had probable merit when it granted the writ of possession. Thus, the court's "DECISION" on the application for writ of possession, filed November 24, 1993, stated in part:

"The matter involves two horses——a mare known as Mi Linda and a stallion known as Domingo Del Gato——and [Mello's] cl[ai]m to right of possession and[] ownership of them under written contract and lien. The horses were taken without [Mello's] permission by [Kirby] and are now in [Kirby's] possession.

"[Mello et al.] are entitled to the [w]rit of [p]ossession only if the court is satisfied that they enjoy a reasonable probability of success when the matter goes to trial.

"The court is satisfied that [Mello et al.] have shown the required likelihood of success. The evidence at the hearing showed that there was a written contract of sale for Mi Linda and a valid lien claim on Domingo. Further that [Kirby's] removal of the animals from [Mello's] property was improper.

"Accordingly, counsel for [Mello] are instructed to prepare and submit to the court a [w]rit of [p]ossession and order

requiring [Kirby] to turn over possession of the horses to [Mello] immediately. . . .”

In granting summary judgment in this malicious prosecution case, the trial court said “The fact that at the hearing on the writ of possession in the Yolo County action the judge’s finding that Mello would probably succeed on the merits is of itself sufficient to establish probable cause. Plaintiff has failed to come forward with any evidence establishing a lack of probable cause . . . .”

We agree with the trial court. Code of Civil Procedure section 512.060 provides as a condition for issuance of a writ of possession that “At the hearing, a writ of possession shall issue if . . . [¶] . . . The plaintiff has established the probable validity of his claim to possession of the property [and has provided an undertaking].” A claim has “probable validity” where “it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.” (Code Civ. Proc., § 511.090.)

Contrary to Kirby’s appellate argument, the trial court did not apply a *conclusive* presumption to the interlocutory ruling but instead implicitly indicated there was a rebuttable presumption which Kirby had failed to rebut. Kirby does not dispute that the court determined probable success on the merits in deciding to grant the writ of possession. Instead, Kirby asserts the court granted the ex parte application for the writ of possession on abbreviated proceedings and did not allow for a full hearing. However, she cites no evidence in the record

supporting this assertion. To the contrary, the record reflects that both sides submitted evidence in connection with the writ of possession, the court ordered a continuance after which Kirby (acting in propria persona) filed supplemental papers, and both sides presented oral argument at the court hearing on the matter.

Kirby cites *Lucchesi v. Giannini & Uniack* (1984) 158 Cal.App.3d 777, which held denial of motions for summary judgment and nonsuit in an underlying action did not demonstrate probable cause defeating a subsequent malicious prosecution action. Kirby also cites *Crowley v. Katleman*, *supra*, 8 Cal.4th 666, 675, fn. 5, and 692, fn. 15, which cited *Lucchesi* with approval in footnotes. Blackman on appeal cites a recent case which reached a contrary result; however, the Supreme Court has since granted review in that case. (*Wilson v. Parker, Covert & Chidester* (2001) 87 Cal.App.4th 1337, rev. granted.) The parties also cite *Roberts v. Sentry Life Insurance, supra,* 76 Cal.App.4th at p. 384, which noted *Lucchesi* was decided before the Supreme Court in *Sheldon Appel* took the subjective good faith aspect out of the probable cause analysis. *Roberts* held denial of a defense summary judgment motion in an underlying case "normally" establishes there was probable cause to sue, thus barring a later malicious prosecution suit, but exceptions exists where, for example, the denial of summary judgment was induced by materially false facts submitted in opposition to the summary judgment motion. (*Id*. at p. 384.)

Cases such as *Lucchesi* do not control the outcome of this appeal, because here the prior ruling in the underlying action was not merely *denial* of a motion, but rather the affirmative *granting* of an application for a writ of possession which, as the trial court expressly stated in granting the writ of possession, necessarily required a determination by the court that Mello had a reasonable probability of success on the merits. This determination establishes probable cause sufficient to defeat the malicious prosecution case. (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 885.)

That the court in the underlying case ultimately reached a different result on the merits after trial does not matter. To defeat a malicious prosecution case, the attorneys who filed and pursued the underlying action need not have been right about the viability of the claim. (*Roberts*, *supra*, 76 Cal.App.4th at pp. 382-383.) Indeed, Kirby herself cites in her reply brief authority holding in cases involving malicious prosecution of criminal actions that the fact the person was held to answer by the committing magistrate (despite later dismissal of the prosecution) was prima facie evidence of probable cause, but was not conclusive. (E.g., *Diemer v. Herber* (1888) 75 Cal. 287, 290.)

Lucchesi, *supra*, 158 Cal.App.3d 777, noted "courts have consistently held that, absent fraud, plaintiff's initial victory in the underlying action amounted to a showing that probable cause existed to bring that action in the first place. But . . . those cases are distinguishable from this in that the

initial victory of the plaintiff in the underlying action followed a full adversary hearing before a trier of fact whose determination reached the merits of that action." (*Id*. at p. 786.) *Crowley, supra*, 8 Cal.4th 666, noted with approval in a footnote the rule that an interim adverse judgment on the merits, even though subsequently set aside on motion or on appeal, conclusively establishes probable cause for the prior action. (*Id*. at p. 692.) The rationale is that approval by a trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable. (*Cowles v. Carter* (1981) 115 Cal.App.3d 350, 358.) *Cowles* held probable cause defeating a malicious prosecution action was shown where the trial court in the underlying tort action denied a motion for nonsuit, after which the jury returned a verdict in favor of the plaintiff in the underlying action, but the interim judgment on the jury's verdict was set aside and judgment notwithstanding the verdict was entered in favor of the tort action defendant. *Cowles, supra*, 115 Cal.App.3d at pp. 356, 359-360, cited with approval a Georgia case, *Short v. Spragins* (1898) 104 Ga. 628, wherein the underlying action sought an injunction in an equitable proceeding for appointment of a receiver. The judge granted a restraining order and appointed a receiver, but at an interlocutory hearing, the same judge dissolved the restraining order, and thereafter the action was terminated without going to judgment. The subsequent action seeking damages resulting from the institution of the underlying case was unsuccessful, with the appellate court noting the judge's ruling granting and later

rescinding the motion for receiver was in the nature of a judgment and would not have been granted if the judge had not determined that the petition made a case entitling the parties to the relief sought. *Cowles, supra*, 115 Cal.App.3d at pp. 356-357, quoted from the Georgia case: "'It is true that an adjudication of this kind is neither permanent nor final, but it is none the less a judicial act essential to the further progress of the case . . . . Surely, it would be hard law which would render a plaintiff liable in damages for instituting an action, wherein he made a truthful and honest statement of the fact, in the event that, notwithstanding a judge of the superior court was satisfied that upon those facts the plaintiff had a meritorious case, a ruling to that effect should afterwards be set aside. It cannot matter that the same judge reversed the judgment rendered by him in sanctioning the petition. This should count for neither more nor less than if the judgment of reversal had emanated from a higher court; for the reason that the inquiry, in either event, would be, not whether the plaintiff had in fact a good and valid cause of action, but whether this was apparently true, and it was accordingly the right of the plaintiff to invoke a judicial decision concerning the merits of the case presented for determination. . . .'" (*Cowles, supra*, 115 Cal.App.3d at pp. 356-357, italics omitted.)

We need not decide whether the circumstances of this case warrant a conclusive presumption of probable cause, because at a minimum the writ of possession clearly reflected a rebuttable

presumption, and Kirby has failed to come forward with any evidence to rebut the presumption.

Kirby asserts in her "INTRODUCTION" portion of her opening brief on appeal that an interim ruling which is later reversed after a full hearing does not establish probable cause, particularly where the ruling was procured by perjured testimony. However, in her opening brief on appeal, Kirby does not cite any evidence of perjury. She has therefore waived the matter. (*In re Marriage of Nichols*, *supra,* 27 Cal.App.4th at pp. 672-673, fn. 3; *Kim v. Sumitomo Bank*, *supra,* 17 Cal.App.4th at p. 979.)

Moreover, we note Kirby's showing was insufficient in the trial court as well. Thus, in opposition to summary judgment, Kirby declared that Mello "lied throughout [the hearing on the request for the writ of possession], and unfortunately the court believed her. After trial, the very same judge ruled against her, having found that she lied. In particular, Ms. Mello's claim on Domingo Del Gato was that I [Kirby] 'gave' him to her because she told me that he was very sick and would incur substantial vet bills; at trial she testified that she had told me that, then found out he was not sick, and there were not going to be large bills, and she never told me that (which was a question *Judge Warriner* asked her). The only basis for her claim on Domingo was thus shown to be a lie when she testified at trial."

We are mindful that affidavits submitted in opposition to summary judgment are liberally construed. (*Tully v. World*

Savings & Loan Assn. (1997) 56 Cal.App.4th 654, 660.) Nevertheless, Kirby's declaration was deficient. Her blanket accusation that Mello lied throughout the hearing fails to identify the lies in order to show they were material. Kirby's assertion that the trial court found Mello lied is defeated by the trial court's statement of decision wherein no such finding appears. Kirby's assertion that Mello admitted at trial that she failed to report to Kirby new information that the horse was not sick, does not indicate that Mello's attorneys——who are the only defendants in the malicious prosecution case——knew or should have known of the asserted omission by Mello. Moreover, the trial court's statement of decision in the underlying action did not reject Mello's gift theory as having been fraudulently induced, but rather concluded "[t]he evidence is insufficient to establish Mello's gift theory as to Domingo."

Kirby contends the trial court in this malicious prosecution case impermissibly took judicial notice of the truth of the allegations made in the writ of possession hearing in the underlying action. However, Kirby cites no evidence supporting her contention. She cites *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, which in the course of affirming a defense summary judgment in a malicious prosecution case, said the trial court properly refused to take judicial notice of the truth of factual assertions appearing in court documents from the prior action, which the plaintiffs tried to use to create a triable issue to defeat summary judgment. (*Id*. at pp. 1560-1569.) The plaintiffs tried to use the documents to defeat the defense that

defendants acted upon advice of counsel; the plaintiffs sought to show the defendants had not informed their attorney of all the facts and therefore could not rely on this defense. (*Id*. at p. 1562.) In the case before us, Kirby cites no evidence that the trial court took judicial notice of the truth of the findings of the court in the underlying case. The key point in this case was that both sides presented evidence and oral argument in the underlying writ of possession proceeding, and the court reached a decision in favor of Mello in that proceeding.

In her reply brief, Kirby raises new issues, e.g., that respondents have failed to demonstrate each cause of action was supported by probable cause. We do not consider new points raised for the first time in the reply brief. (*Neighbours v. Buzz Oates Enterprises, supra,* 217 Cal.App.3d at p. 335, fn. 8.)

We thus conclude there is no basis for reversal of the summary judgment. We need not address respondents' arguments that Kirby's malicious prosecution complaint is defeated by the fact she was not the prevailing party in the Yolo County action. We need not address Blackman's argument that probable cause was also established by the court's issuance in the underlying action of an injunction prohibiting the parties from harassing each other, and denial of a nonsuit motion.

V. Motion for Sanctions for Frivolous Appeal

On June 8, 2001, Blackman filed in this court a motion for sanctions for a frivolous appeal, pursuant to Code of Civil

Procedure section 907, and rule 26(a). We shall deny the motion.

An appeal is held frivolous only when it is prosecuted for an improper motive——to harass the respondent or delay the effect of an adverse judgment——or when it indisputably has no merit——when any reasonable attorney would agree that the appeal is totally and completely without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) We conclude this standard is not met in this case.

The motion for sanctions is denied.

DISPOSITION

The judgment is affirmed. Clough and Blackman shall recover their costs on appeal. (Rule 26(a).) Blackman's motion for sanctions for a frivolous appeal is denied.

SIMS, J.

We concur:

SCOTLAND, P.J.

RAYE, J.